

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ROBYN BURTON,

Plaintiff,

v.

SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No. 2:12-CV-303-KJD-GWF

ORDER

Before the Court are two motions for fees and costs filed by Plaintiff Robyn Burton's counsel ("Counsel"). Counsel filed an original Motion for fees under the Equal Access to Justice Act ("EAJA") (#35) which was later amended (#36), and then amended yet again (#44) in order to include the necessary elements. Furthermore, none of these filings contain the complete motion, but rather Counsel improperly left it to the Court to amalgamate his claims and evidence. The Social Security Administration ("Defendant") opposed the motion(s) (#40) and Counsel replied (#45). Counsel also filed a motion for fees and costs under 42 U.S.C. § 406(b) (#43). Defendant responded (#51), and Counsel failed to reply. The background of this matter is familiar to the Court and the parties and so will not be recounted here.

I. Legal Standards

"Fee awards may be made under both [the EAJA and 42 U.S.C. § 406(b)], but the claimant's attorney must refund to the claimant the amount of the smaller fee. Gisbrecht v. Barnhart, 535 U.S. 789, 796 (2002) (alterations and citation omitted). To be clear, the government pays EAJA fees, while the claimant pays fees under 406(b). See, e.g., Parrish v.

1 Comm’r of Soc. Sec. Admin., 698 F.3d 1215, 1218 (9th Cir. 2012). Thus, the EAJA award
 2 offsets an award under 42 U.S.C. § 406(b) up to the point that the claimant actually receives 100
 3 percent of the past-due benefits. Gisbrecht, 535 U.S. at 796. The Court also notes that an award
 4 under the EAJA belongs to the litigant, and not to counsel directly. Astrue v. Ratliff, 560 U.S.
 5 586, 593 (2010).

6 **A. EAJA Fees under 28 U.S.C. § 2412(d)**

7 **i. The Statute Generally**

8 Fees and “other expenses” under 28 U.S.C. § 2412(d) “shall” be awarded to a “prevailing
 9 party” unless the Court finds the position of the Social Security Administration to be
 10 “substantially justified” § 2412(d)(1)(A). To obtain fees and other expenses, a party must
 11 comply with § 2412(d). The contested requirements are listed below:

- 12 • The party seeking fees and other expenses must not have a net worth exceeding
 13 \$2,000,000 at the time the civil action was filed.
- 14 • Allege that the position of the government¹ was not substantially justified based upon the
 15 record
- 16 • Request only “reasonable” fees and costs

17 **ii. Substantial Justification**

18 “The government bears the burden of demonstrating substantial justification.” Thangaraja
 19 v. Gonzales, 428 F.3d 870, 874 (9th Cir. 2005). The government’s positions are “substantially
 20 justified” when they are founded upon “such relevant evidence as a reasonable mind might
 21 accept as adequate to support a conclusion.” Pierce v. Underwood, 487 U.S. 552, 565 (1988)
 22 (citing Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938)). Thus, the
 23 government’s positions must have a “reasonable basis both in law and fact.” Id. at 565. However,
 24 it is a “decidedly unusual case in which there is substantial justification under the EAJA even

25 ¹ “The position of the United States includes both the government’s litigation position and the underlying
 26 agency action giving rise to the civil action.” Meier v. Colvin, 727 F.3d 867, 870 (9th Cir. 2013) (internal quotations
 omitted).

1 though the agency's decision was reversed as lacking in reasonable, substantial and probative
 2 evidence in the record." Al-Harbi v. I.N.S., 284 F.3d 1080, 1085 (9th Cir. 2002) (internal
 3 quotations omitted). The Ninth Circuit recently underscored the substantial overlap between
 4 cases where the ALJ's decision lacks substantial evidence and where the government's position
 5 is not substantially justified:

6 While this circuit has been clear that when an agency's decision is
 7 unsupported by substantial evidence it is a strong indication that
 8 the position of the United States is not substantially justified, this
 9 circuit has never stated that *every* time this court reverses and
 10 remands the ALJ's decision for lack of substantial evidence the
 11 claimant should be awarded attorney's fees.

12 Campbell v. Astrue, 736 F.3d 867, 869 (9th Cir. 2013).

13 In determining whether the government's position is substantially justified, the EAJA
 14 "favors treating a case as an inclusive whole, rather than as atomized line items." Al-Harbi v.
 15 I.N.S., 284 F.3d 1080, 1085 (9th Cir. 2002). However, where an "ALJ rejected a treating
 16 physician's opinion in favor of a non-treating physician's opinion without providing clear and
 17 convincing reasons, and committed [other] errors . . . [i]t follows *a fortiori* the government's
 18 defense of the ALJ's procedural errors was not substantially justified, and . . . attorneys' fees
 19 under the EAJA [are justified]. Shafer v. Astrue, 518 F.3d 1067, 1072 (9th Cir. 2008). Similarly,
 20 the government's position lacked a reasonable basis in fact where the ALJ "mis-character[ized]
 21 [] the medical evidence" and lacked a reasonable basis in law where the ALJ "failed to inquire
 22 adequately" and "take adequate account" of the evidence. Sampson v. Chater, 103 F.3d 918, 922
 23 (9th Cir. 1996) but see Lewis v. Barnhart, 281 F.3d 1081, 1084 (9th Cir. 2002) (finding that
 24 where an ALJ mischaracterized testimony evidence, the government's position was substantially
 25 justified because there was no procedural error and evidence in the record provided some support
 26 for the ALJ's determination).

27 **iii. Reasonableness of the Fees and Other Expenses**

28 "Fees and other expenses" are defined as "reasonable" fees and costs, capped by statute
 29 at \$125 per hour "unless the court determines" that an increase is justified. § 2412(d)(2)(A). The

1 Ninth Circuit publishes such increases, and has determined that the maximum rates in 2012 and
 2 2013 were \$184.32 and \$187.02 respectively. Ninth Circuit Court of Appeals, Statutory
 3 Maximum Rates under the Equal Access to Justice Act, [http://www.ca9.uscourts.gov/content/
 4 view.php?pk_id=0000000039](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039) (last visited July 1, 2014). However, beneath this cap, a
 5 “reasonable” rate is determined by twelve factors:

6 (1) the time and labor required; (2) the novelty and difficulty of the
 7 questions; (3) the skill requisite to perform the legal service
 8 properly; (4) the preclusion of employment by the attorney due to
 9 acceptance of the case; (5) the customary fee; (6) whether the fee is
 10 fixed or contingent; (7) time limitations imposed by the client or
 the circumstances; (8) the amount involved and the results
 obtained; (9) the experience, reputation, and ability of the
 attorneys; (10) the “undesirability” of the case; (11) the nature and
 length of the professional relationship with the client; and (12)
 awards in similar cases.

11 Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983).

12 In determining whether a fee is reasonable, “hours that are excessive, redundant, or
 13 otherwise unnecessary” should be excluded because “[h]ours that are not properly billed to one’s
 14 *client* also are not properly billed to one’s *adversary* pursuant to statutory authority.” Hensley v.
 15 Eckerhart, 461 U.S. 424, 434 (1983). However, courts “should generally defer to the winning
 16 lawyer’s professional judgment as to how much time he was required to spend on the case.”
 17 Costa v. Comm’r of Soc. Sec. Admin., 690 F.3d 1132, 1136 (9th Cir. 2012) (internal quotation
 18 omitted). Thus, a ten percent reduction in hours “reasonably” billed may be undertaken without
 19 explanation, but larger reductions must be explained. Id. at 1136. As the Ninth Circuit has
 20 repeatedly stated “lawyers are not likely to spend unnecessary time on contingency fee cases in
 21 the hope of inflating their fees because the payoff is too uncertain.” Costa, 690 F.3d at 1136
 22 (internal quotation and alteration omitted) (citing Moreno v. City of Sacramento, 534 F.3d 1106,
 23 1112 (9th Cir. 2008)).

24 **B. Fees under 42 U.S.C. § 406(b)**

25 In determining fees under § 406(b), a court engages in two steps. Gisbrecht v. Barnhart,
 26 535 U.S. 789, 808 (2002). First, it looks to the contingent-fee agreement. Id. at 808. Second, it

1 tests that agreement for reasonableness, including by looking to the character of the
2 representation and the results achieved. Id. at 808. For example, the fee should be reduced if the
3 attorney is responsible for delay, or if the award would constitute a windfall. Id. at 808.

4 **II. Analysis**

5 **A. EAJA Fees under 28 U.S.C. § 2412(d)**

6 To begin, Defendant asserts that Plaintiff fails to allege eligibility based on net worth. In
7 response, Plaintiff alleges a net worth of less than \$2 million (#44 at 2). This allegation has not
8 been disputed. Accordingly, the Court finds that this requirement is no longer in dispute. The
9 Court turns now to the substantive questions of whether the Government's position was
10 substantially justified and whether the fees and costs sought are "reasonable."

11 **i. Substantial Justification**

12 The Government has failed to show that its position was substantially justified. First, as
13 in Al-Harbi, and as discussed in the Magistrate's report and recommendation adopted by this
14 Court, the ALJ improperly weighed the opinions of Plaintiff's treating physician relative to the
15 assessment of the State agency medical consultant (#17 at 15-20). Second, as in Shafer, and as
16 discussed in the Magistrate's report and recommendation adopted by this Court, the ALJ either
17 dramatically misinterpreted evidence or intentionally wrested it from context in making his
18 findings (#17 at 15-20). However, the Government's position was not substantially justified even
19 after this case had moved beyond the ALJ's decision.

20 After this Court adopted and affirmed the recommendation of the Magistrate (#24), the
21 Government moved the Court to reconsider (#25). The Government asserted that reconsideration
22 was necessary to "correct manifest errors of law." However, both the Government and this Court
23 have repeatedly acknowledged that this area of the law is deeply conflicted. Further, the
24 Government failed to argue that the Court's decision was in any way beyond the contours of the
25 law. Accordingly, the Government's position that the Court had made "manifest errors of law"
26 was not substantially justified because it lacked a reasonable basis in law. Accordingly, the Court

1 finds that multiple Governmental positions were not substantially justified.

2 **ii. Reasonableness of the Fees**

3 Counsel seeks a total of \$12,278.13 in fees, consisting of fees for work done in 2012 and
4 2013 using the maximum rates provided by the Ninth Circuit in those years. Having reviewed the
5 twelve Hensley factors, the Court exercises its discretion and reduces the reasonable hours billed
6 by ten percent, but otherwise defers to Counsel's judgment as to how much time was required in
7 this case. Accordingly, the Court awards the reasonable fee of \$11,050.32. Because these funds
8 properly belong to the litigant and not Counsel, they are awarded to Plaintiff. It appears that
9 Plaintiff properly assigned these fees to Counsel, but Counsel has failed to demonstrate that the
10 Court should abrogate the usual chain of stewardship and award these funds directly to Counsel.

11 **iii. Costs**

12 The Court finds that Counsel's representations regarding costs is sufficient, that the
13 disputed \$55.00 charge for "Legal Process Service" is justified (#44, Ex. 4). Accordingly, the
14 Court awards the full \$405.00 in costs to Plaintiff.

15 **B. Fees under 42 U.S.C. § 406(b)**

16 The Court notes that Counsel seeks \$9,256.75 in fees under 42 U.S.C. § 406(b).
17 However, as this amount is smaller than the award under the EAJA, and as Counsel would be
18 required to remit this amount to Plaintiff even if the motion were granted, the Court denies the
19 motion as moot.

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Accordingly, the Court **HEREBY AWARDS** Plaintiff \$11,050.32 in fees and \$405.00 in costs pursuant to the EAJA, **GRANTING** Motion(s) ## 35, 36, 44.

DATED this 9th day of July 2014.

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